

**38 CFR Part 3****RIN 2900-AR46****Inclusion of the Space Force as Part of the Armed Forces**

AGENCY: Department of Veterans Affairs.

ACTION: Final Rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this final rule to amend its adjudication regulations to implement the mandates of section 926 of the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021, which authorized VA to furnish benefits based on Space Force service.

DATES: Effective Date: This rule is effective [insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jane Allen, Policy Analyst, Part 3 Regulations Staff (211), Compensation Service (21C), 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9602. (This is not a toll-free telephone number.)

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SUPPLEMENTARY INFORMATION: On December 20, 2019, Congress enacted the “United States Space Force Act” (USSFA), which established the “United States Space Force as an armed force within the Department of the Air Force.” USSFA, Public Law 116-92, sections 951-952, 133 Stat 1198, 1561-62 (2019). Subsequently, Congress expanded the definition of “veteran” and made other amendments to title 38 to require VA to furnish benefits and services on the basis of service in the Space Force. William M. (Mac) Thornberry NDAA for FY 2021, Public Law 116-283, section 926, 134 Stat. 3388, 3829 (2021). To implement these changes, VA is amending 38 CFR part 3 to add

the words “Space Force” in various sections that list the branches of the U.S. Armed Forces and to add reference to “space service” in references to “active military, naval, or air service.” VA is also amending 38 CFR 3.1(g)(3) to add the USSF as operating under the direction of the Secretary of the Air Force.

Administrative Procedure Act

The Secretary of Veterans Affairs finds that there is good cause under the Administrative Procedure Act (APA) to publish this rule without prior opportunity for public comment and with an immediate effective date. Pursuant to 5 U.S.C. 553(b)(B), general notice and opportunity for public comment are not required with respect to a rulemaking when an “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” The Secretary finds that it is unnecessary to delay issuance of this rule for the purpose of soliciting prior public comment. Where Congress has left a gap in a statute for an agency to fill, requiring notice and comment rulemaking secures public input and “promote[s] accountability among decisionmakers.” *Himes v. Sullivan*, 779 F. Supp. 258, 270 (W.D.N.Y. 1991) (quoting *Cal. Ass’n. of Bioanalysts v. Rank*, 577 F. Supp. 1342, 1348 (C.D. Cal. 1983)), *aff’d by* 956 F.2d 1159 (2d Cir. 1992). However, “[c]hanges mandated by a legislature have already gone through a public process, and, as a result, the objectives of the notice requirements . . . already have been satisfied in the legislative process.” *Id.* (quotation and citation omitted). This rulemaking presents the latter situation. By statute, Congress has required VA to furnish benefits on the basis of space service. VA does not have any discretion to deny benefits on the basis that the claim is predicated on “space service” rather than “military, naval, or air service.” See *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (“Veteran’s disability benefits are nondiscretionary, statutorily mandated benefits.”). VA’s authority is

limited to implementing the statutes as enacted by Congress. Therefore, additional public comment would be superfluous. See *Rank*, 577 F. Supp. at 1348. In addition, as this amendment solely identifies the USSF as a branch of the U.S. Armed Forces and expands regulatory references of “active military, naval, or air service” to include “space service,” there is little or no room for substantive changes to the rule based on public comment.

The APA also requires a 30-day delayed effective date, except for “(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.” 5 U.S.C. 553(d). For the reasons stated above, the Secretary finds that there is also good cause for this rule to be effective immediately upon publication. Any delay in implementation would be unnecessary for purposes of 5 U.S.C. 553(d)(3).

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, is not applicable to this rulemaking because notice of proposed rulemaking is not required. 5 U.S.C. 601(2), 603(a), 604(a).

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. § 801 et seq.), the Office of Information and Regulatory Affairs has designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on April 27, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,
Regulations Development Coordinator,
Office of Regulation Policy & Management,
Office of General Counsel,
Department of Veterans Affairs

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 3 as set forth below:

PART 3 – ADJUDICATION

Subpart A – Pension, Compensation, and Dependency and Indemnity

Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501, unless otherwise noted.

§ 3.1 [Amended]

2. Amend § 3.1 as follows:

- a. Add “Space Force,” after “Air Force,” in paragraphs (a) and (b);
- b. Remove “or air service” and add in its place “air, or space service” in paragraph (d) introductory text;
- c. Remove “or air service” and add in its place “, air, or space service” in paragraph (d)(2);
- d. Remove “or air service” and add in its place “, air, or space service” in paragraph (e);
- e. Add “or the Space Force” after “concerning the Air Force” in paragraph (g)(3);
- f. Remove “or air service” and add in its place “air, or space service” in paragraph (h);
- g. Remove “or air service” and add in its place “air, or space service” in paragraphs (k), (l), and (m) introductory text;
- h. Remove “or air service” and add in its place “, air, or space service” in paragraph (y) introductory text.

§ 3.3 [Amended]

3. Amend § 3.3 by removing “or air service” each place it appears and adding in each place “, air, or space service” in paragraphs (a)(3)(i) through (iv).

§ 3.6 [Amended]

4. Amend § 3.6 by removing “and air service” and adding in its place “air, or space service” in the paragraph (a) heading.

§ 3.7 [Amended]

5. Amend § 3.7 by removing “or air service” and adding in its place “air, or space service” in the section heading, the introductory text, and paragraph (o)(1)(i).

§ 3.12 [Amended]

6. Amend § 3.12 by removing “or air service” and adding in its place “, air, or space service” in paragraph (g)(2).

§ 3.13 [Amended]

7. Amend § 3.13 by removing “or air service” and adding in its place “, air, or space service” in paragraphs (c) introductory text and (c)(1).

§ 3.159 [Amended]

8. Amend § 3.159 by removing “or air service” and adding in its place “, air, or space service” in paragraph (c)(3).

§ 3.301 [Amended]

9. Amend § 3.301 by removing “or air service” and adding in its place “air, or space service” in paragraph (d).

§ 3.306 [Amended]

10. Amend § 3.306 by removing “or air service” and adding in its place “air, or space service” in paragraph (a).

§ 3.309 [Amended]

11. Amend § 3.309 by removing “or air service” and adding in its place “air, or space service” in paragraphs (c)(1) introductory text and (c)(2)(ii) introductory text.

§ 3.318 [Amended]

12. Amend § 3.318 by removing “or air service” and adding in its place “air, or space service” in paragraph (a).

§ 3.807 [Amended]

13. Amend § 3.807 by removing “or air service” and adding in its place “air, or space service” in paragraphs (a)(5)(ii) and (b).

§ 3.808 [Amended]

14. Amend § 3.808 by removing “or air service” and adding in its place “air, or space service” in paragraph (a)(2).

§ 3.809 [Amended]

15. Amend § 3.809 by removing “or air service” and adding in its place “air, or space service” in paragraph (a).

§ 3.809a [Amended]

16. Amend § 3.809a by removing “or air service” and adding in its place “air, or space service” in paragraph (b).

§ 3.903 [Amended]

17. Amend § 3.903 by removing “or air service” and adding in its place “air, or space service” in paragraph (b)(1).

§ 3.1701 [Amended]

18. Amend § 3.1701 by removing “or air service” and adding in its place “air, or space service.”